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No. 97-2011

In The

Supreme Court of the United States

October Term, 1997

IN RE ROBERT C. HILLIARD,

Petitioner.

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY

A. Judge Bennett Concedes Mr. Hilliard Correctly Characterizes the Facts of This Case.

Mr. Hilliard neither misstated nor omitted a single fact mentioned in Respondent's Brief in Opposition ("Opposition Brief" or "BIO"). (*Compare* BIO at 1-8 *with* Petition at 2-16.) In his Opposition Brief, Judge Bennett contends to the contrary, stating that Mr. Hilliard has "mischaracterized" the facts of the proceedings below. (BIO at 1.)[1] Notwithstanding this conclusory statement, however, Judge Bennett implicitly concedes that Mr. Hilliard's Petition correctly presents the facts of this case because Judge Bennett fails to identify even one instance of mischaracterization. In fact, Judge Bennett relies almost entirely upon the appendix materials provided by Mr. Hilliard and depicts the case by discussing the precise facts put forward in the Petition. Judge Bennett acknowledges, then, that the Petition's Statement of Facts is correct and relevant.

Judge Bennett's Opposition Brief suggests only two areas of misstatement. First, Judge Bennett states that Mr. Hilliard's "public statements" to the "media" bely his protestations of innocence. (BIO at 2-3.) Yet, Mr. Hilliard put this issue squarely before this Court in the text (as opposed to mere appendix) of his Petition. (Petition at 11 ("Aside from what Mr. Hilliard already had told the media – namely, that he filed in this manner in order to land one of his cases in a particular court, before a

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[1] Mr. Hilliard uses the same abbreviations and shorthand references he used in his Petition.

particular judge – he asserted the attorney-client privilege as to Judge Bennett's questions (asked, as they were, before opposing counsel).")) Mr. Hilliard brought his media statements directly to the Court's attention – he did not "protest innocence" and hide these statements from the Court.

Second, Judge Bennett describes as "inexplicable" Mr. Hilliard's position that he committed no *actus reus* in violation of any rule or law. (BIO at 11 n.6.) Yet Judge Bennett cannot identify a single rule or law that renders punishable Mr. Hilliard's conduct. In fact, the one rule or law he discusses – Rule 13 of the Texas Rules of Civil Procedure: (1) neither mentions nor describes Mr. Hilliard's conduct; and (2) was unmentioned in the Show Cause Order. (*See* Petition at 13 n.12; *compare* App. 80-81 [Show Cause Order – no mention of Rule 13] *with* App. 105 [Sanction Order – reliance on Rule 13].)

Mr. Hilliard's "claim" of "innocence" is not inexplicable; rather, what is inexplicable is Judge Bennett's continued inability to identify what law Mr. Hilliard allegedly broke. Mr. Hilliard has stated from the beginning that he filed the cases in the manner he did, intentionally, and with his clients' best interests in mind. He never caused – or even suggested to – anyone in the Nueces County clerk's office that they should file or handle his cases other than in accordance with Nueces County District Court Local Rules. At worst, then, Mr. Hilliard thought about and wanted to "forum-shop." This is the heinous crime that Judge Bennett contends merits a $10,000 fine.[2]

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[2] As an aside, Judge Bennett appears to be offended by the phrase "forum-shop" because it connotes to him the idea that a

In short, Judge Bennett's Opposition Brief concedes the correct and fully supported statement of the facts provided by Mr. Hilliard's Petition. Judge Bennett's failure to identify one "mischaracterization" of the record is not due to oversight on his part. Mr. Hilliard correctly and fully has presented to the Court the factual nature of the proceedings below.

B. Mr. Hilliard Presents Properly Preserved Error to This Court for Review.

1. The Parties Litigated Whether Judge Bennett Could Sit as a Judge in a Case in Which He Also Served as Investigator, Accuser, Prosecutor, and Award Beneficiary.

Judge Bennett contends that the issue of whether he sat as "investigator, complainant, prosecutor, trier of fact, judge, and beneficiary of award" is not properly before

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litigant perceives one court as preferable to another. Judge Bennett cannot articulate any reason for why this is a sanctionable belief. If it is Judge Bennett's position that all courts are, in fact, fair, then forum-shopping exists in a vacuum – no benefit or harm can accrue as a result of forum-shopping in a system in which all judges are fair. If Judge Bennett's position is that Mr. Hilliard filed "frivolous" lawsuits (with their concomitant burden on the legal system), the record contains no evidence of this. Mr. Hilliard correctly asserted his attorney-client privilege and declined to discuss how he intended to handle his cases, before defense counsel, at such an early stage of the litigation. Finally, if Judge Bennett's position is that Mr. Hilliard's conduct violated the Nueces County District Court filing procedures, the record makes clear that the Nueces County District Court Clerk filed all of the cases in accordance with the county's Local Rules. (App. 38-46.)

the Court. (BIO at 9-10.)[3] Accordingly, Judge Bennett concedes that he, in fact, did wear all these hats. His only argument is that Mr. Hilliard "waived" this matter for review by not "objecting." (*Id.*)

As an initial matter, it is not at all clear that such error is "waivable" (as opposed to being so fundamentally wrong as to allow for review by appellate courts even in the absence of proper objection). *See United States v. Neal*, 101 F.3d 993, 996 & 999-1000 (4th Cir. 1996) (holding that, in a case in which a judge sits as complainant and prosecutor, such error is "plain error" requiring reversal, even in the absence of proper objection). Putting aside this question, however, Mr. Hilliard has provided this Court with a record replete with objections.

Indeed, the sole item Judge Bennett provides in his appendix *reflects* Mr. Hilliard's precise objection on this issue. (BIO App. at 22-26; *see also* BIO at 7 (admitting that Mr. Hilliard objected to Judge Bennett sitting as judge on a "separation of powers" basis).) *Cf. United States v. Neal*, 101 F.3d at 999 (in case in which "the district judge investigated the incriminating facts through extrajudicial

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[3] Judge Bennett "objects" to Mr. Hilliard's depiction of him as the "beneficiary of award." (*See, e.g.*, BIO at 9 n.4.) Mr. Hilliard attaches a copy of Judge Bennett's clerk's receipt (reflecting the 319th District Court's clerk's signature) for Mr. Hilliard's check in the amount of $10,000 as "Appendix P." Judge Bennett certainly *did* receive the benefit of the $10,000 award – albeit while wearing his "court" hat. As for Judge Bennett's claim to this Court that the $10,000 is "trivial" (BIO at 10 n.5), such an extraordinary statement underscores the inappropriateness of Judge Bennett's sitting in this matter as accuser, adversary, and adjudicator.

means, introduced evidence against Neal, and otherwise presented the Government's case, he improperly assumed a prosecutorial role . . . ," holding that such conduct violated "separation of powers" doctrine).

While it is true that Mr. Hilliard's objections to Judge Bennett's power to adjudicate at the "show cause" hearing were not as artfully articulated as appellate practitioners might desire, it is nonetheless a fact that in his Reply to Show Cause Order, Mr. Hilliard objected to Judge Bennett's:

(i) lack of jurisdiction;

(ii) violation of federal constitutional rights (due process);

(iii) lack of proper notice; and

(iv) lack of authority to sanction, under the circumstances.

(App. at 91-93 [lack of jurisdiction], 93-94 [due process {focusing on lack of notice but raising global due process issues}], 94-95 [ambiguity of order {failure to identify conduct in violation of rule or statute}], and 95-97 [lack of authority to act in such a sweeping exercise of punitive power].)

The fact that Judge Bennett admits the impropriety of *his* conduct (*viz.*, wearing at least five different hats at one hearing) but denies the sufficiency of Mr. Hilliard's objections is, perhaps, the best evidence for why this Court should grant *certiorari* here: to spell out what is intuitively obvious – while a trial court *does have* authority to sanction conduct both before and outside of its

presence, it *does not have* authority to wear every hat in our three-part, governmental system.

And, in any event, even if all this were not enough to preserve error, the parties litigated the precise issue of the federal, constitutional, due process scope of Judge Bennett's authority before both the Corpus Christi Court of Appeals and the Texas Supreme Court. Indeed, the Corpus Christi Court of Appeals wrote on this precise topic, observing:

> If the jurisdictional shortcomings are overlooked, serious due process concerns are implicated. Even if the relators had nonsuited the underlying lawsuit and the respondent could demonstrate that he was acting within his inherent power to sanction,[ ] he did not have the authority to be both accuser and adversary to the relators on the one hand, while remaining the ultimate judge of their conduct on the other.

(App. at 138 [Court of Appeals' Opinion] (footnote omitted).) As this Court has held repeatedly, a party is not barred by failure to cite the proper constitutional provisions when the lower courts consider the relevant provisions. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217 n.3 (1968) (and cases cited therein), and *Gibbs v. Burke*, 337 U.S. 773, 779 (1949) ("The federal question was adequately if inartistically raised in the petition for a writ of habeas corpus."). Here, the lower court did not merely "consider the relevant provisions" of the federal constitution, it *held* the federal constitution barred Judge Bennett from sitting as accuser, adversary, and adjudicator. Likewise, the Texas Supreme Court considered and rejected Mr. Hilliard's arguments. (App. at 11-13.)

In short, Judge Bennett's claims to this Court that it ought not countenance Mr. Hilliard's "appellate ambush" thus are disingenuous. (*See* BIO at 11.) As a judge and as a party, Judge Bennett has been well aware of all of the issues raised herein since this case's inception. His protestations to the contrary are simply more evidence of why the Court should grant review by *certiorari*: if a sitting judge cannot understand a party's objection to his conducting a legal proceeding as complainant, prosecutor, and judge, this Court should provide explicit guidance to protect the Constitution.

2. The Burden of Proof Is a Question of Law – the Law Does Not Require a Defendant to Apprise His Prosecutor of the State's Evidentiary Standards.

Judge Bennett complains that Mr. Hilliard has "waived" the "beyond reasonable doubt" standard of proof applicable to his case. (BIO at 10.) In particular, Judge Bennett claims that Mr. Hilliard did not bring to his attention the fact that (1) the proceeding was one of "criminal contempt," as opposed to "civil contempt"; and (2) the law required Judge Bennett to prove his case "beyond reasonable doubt."

As to the first issue, Judge Bennett's trial level determination that the proceeding was one of "civil" and not "criminal" contempt is simply not determinative, nor is Mr. Hilliard's purported failure to tell Judge Bennett what kind of proceeding was occurring. *See, e.g., International Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 838-39 (1994) ("civil v. criminal" distinction is

one of law when judge, as opposed to legislature, makes the decision), *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1401 (6th Cir. 1991) (rejecting precise argument raised by Judge Bennett, namely, that failure to object to civil v. criminal distinction waives issue for review on appeal), *Buffington v. Baltimore County, Maryland*, 913 F.2d 113, 133 (4th Cir. 1990) ("A district court's description of a contempt sanction as either civil or criminal is not determinative and must be scrutinized independently by the appellate court."), *cert. denied*, 499 U.S. 906 (1991), and *TWM Mfg. v. Dura Corp.*, 772 F.2d 1261, 1270 n.8 (6th Cir. 1983), *cert. denied*, 479 U.S. 852 (1986); *see also New York State Nat'l Org. for Women v. Terry*, 41 F.3d 794, 796-97 (2d Cir. 1994) (*per curiam*) (analyzing whether case involved civil or criminal sanctions).

As to the second issue, it is perhaps because Judge Bennett is a *judge* and not a *prosecutor* that he was unfamiliar with his burden of proof – it being, in criminal contempt cases, the "beyond reasonable doubt" standard. If so, this underscores the impropriety of his conduct. Regardless, however, of whether Judge Bennett should have been aware of the correct standard of proof, a defendant is not required to inform his prosecutor of the state's burden of proof. Judge Bennett's failure to cite a single case to the contrary underscores the obvious weakness of his position. (*See* BIO at 10-11.)

C. Review on Petition for Writ of Certiorari Is Appropriate.

The remainder of Judge Bennett's Opposition Brief contends that this case is not worthy of review by *certiorari*. (BIO at 11-15.) Mr. Hilliard respectfully contends to the contrary. Few matters merit this Court's attention so much as naked disregard, not for the physical document of the Constitution, but, instead, for the values the Constitution embodies.

The founding fathers drafted the Constitution with an eye towards the end of tyranny. The particular tyranny at issue came in the form of a political system that left unfettered one individual – for example, a king – by any "due process" system that would protect individual citizens.

If Judge Bennett did not know that the Federal Constitution prevented him from sitting as an investigator, complainant, prosecutor, trier of fact, judge, and recipient of award in one case, and if the Texas Supreme Court also does not know this to be the case, then surely this Court needs to make crystal clear to all representatives of state court judiciaries that such is, in fact, the law in America for all courts, not just federal courts.

In *United States v. Neal*, 101 F.3d at 993, the Fourth Circuit observed, "At the time of Neal's hearing, the settled law of the Supreme Court was abundantly clear that the simultaneous assumption of inconsistent roles of prosecutor and judge transgresses our most fundamental notions of procedural fairness." *Id.* at 998. The Fourth Circuit, however, was addressing the conduct of a federal district court. Mr. Hilliard respectfully submits that this

Court should grant a writ of *certiorari* and make "abundantly clear" that the same rule obtains in the judiciary systems of the states.

CONCLUSION

As Alexander Hamilton once observed, liberty has nothing to fear from a judiciary isolated from the executive and legislative branches, but "would have everything to fear from its union with either of the other departments. . . . " *See id.* at 999 (quoting *The Federalist No. 78*, at 491 (Alexander Hamilton) (Benjamin F. Wright ed., 1961)). Mr. Hilliard petitions the Court to grant a writ of *certiorari*.

Respectfully submitted,

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March 13, 1998

Re: Cause No. 95-4900-G; Cause No. 13-96-042-CV; and Cause No. 96-0598

Today the 13th day of March, 1998, I have received check number 8135 in the amount of $10,000.00 from Robert C. Hilliard, P.C.

/s/ Lillian Fanning
319TH DISTRICT COURT
NUECES COUNTY, TEXAS